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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

## Theodore Cush McDowell

**Plaintiff,**

No. CV-11-0716-PHX-DGC

## ORDER

VS.

Shelton Richardson,

## Defendant.

Petitioner Theodore Cush McDowell filed a motion for reconsideration of the Court’s order of October 31, 2011 (Doc. 15) accepting Magistrate Judge Mark A. Aspey’s Report and Recommendation (“R&R”) and denying Petitioner’s petition for a writ of habeas corpus. Doc. 17. The Court noted in that order that Petitioner had filed no objections to the R&R and accepted without review Judge Aspey’s recommendation to deny the petition. Doc. 15 at 1. Petitioner has provided documentation showing to the Court’s satisfaction that he filed objections to the R&R on October 6, 2011. See Doc. 17. The Court will grant Petitioner’s motion for reconsideration and review Petitioner’s objections to the R&R.

## I. Background.

On October 17, 2007, Petitioner was tried with four co-defendants before a problem Superior Court Judge and found guilty of one count of possession of marijuana for sale and one count of possession of drug paraphernalia. *See R&R*, Doc. 14 at 1-2. The trial court sentenced Petitioner to the five year presumptive term on the possession for sale offense and, after he refused to sign terms and conditions of probation on the drug

1 paraphernalia offense, sentenced him to the presumptive one year term on that offense, to  
2 be served concurrently with the possession for sale offense. *Id.* at 2. Petitioner appealed  
3 his convictions and sentences, asserting that (1) he did not knowingly and intelligently  
4 waive his right to trial counsel; (2) the trial court erred by sentencing Petitioner to a term  
5 of imprisonment for possession of paraphernalia because Arizona statutes mandated a  
6 sentence of probation; (3) the trial court erred by not establishing it had jurisdiction over  
7 Petitioner's case because the court commissioners did not have authority to issue search  
8 warrants or preside over criminal trials and also failed to have loyalty oaths on file with  
9 the Arizona Secretary of State. *Id.* at 2-3. On June 4, 2009, the Arizona Court of  
10 Appeals denied Petitioner's claims on the merits, and on October 27, 2009, the Arizona  
11 Supreme Court denied review. *Id.* at 3.

12 On April 11, 2011, Petitioner filed a petition for federal habeas relief. Doc. 1.  
13 Petitioner raised the same three grounds he raised in state court, and he raised as a fourth  
14 ground that the trial court committed structural or fundamental error when it erroneously  
15 instructed the jury that it could convict him on coconspirator liability. Doc. 1 at 6-9.  
16 Petitioner also argued that his petition, though untimely, was not barred by the one year  
17 statute of limitations because at the time he was booked into prison he was unable to  
18 bring his legal papers or court transcripts with him. *Id.* at 14.

19 Judge Aspey recommended in the R&R that the Court deny the petition with  
20 prejudice because it is barred by the applicable statute of limitations and, in the  
21 alternative, because each of Petitioner's claims fails on the merits. Doc. 14 at 18. For the  
22 reasons that follow, the Court will accept the R&R and deny the petition.

23 **I. Standard of Review.**

24 A party may file specific written objections to the R&R's proposed findings and  
25 recommendations. The Court must undertake de novo review of those portions of the  
26 R&R to which specific objections are made. The Court may accept, reject, or modify, in  
27 whole or in part, the findings or recommendations made by the Magistrate Judge. Fed. R.  
28 Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

1       **III. Analysis.**

2           Petitioner has made no specific objections to the R&R's findings of fact and law.  
3           Though labeled "Objections to Report and Recommendation," Petitioner's objections  
4           never refer substantively to the R&R at all. Instead, Petitioner makes the same arguments  
5           for equitable tolling of the statute of limitations that he made in his original petition and  
6           reply. Compare Doc. 1 at 11 and Doc. 13 at 2-4 with Doc. 17 at 5-6. Similarly, for each  
7           of Petitioner's substantive claims, Petitioner's objections merely incorporate – with some  
8           added details for claims one and three – the same arguments he made in his original  
9           petition and reply. Compare Docs. 1 at 6-9 and Doc. 12 at 4-6 with Doc. 15 at 6-10.  
10          Even considering the added detail Petitioner adds from the pre-trial transcript with regard  
11          to his mental state when he waived his right to counsel (*see* Doc. 17 at 3-4), the Court  
12          finds that Petitioner is not entitled to relief because Judge Aspey determined that the state  
13          Court of Appeals had already conducted a "thorough and well-reasoned review" of this  
14          claim, including the facts of the case and relevant law, and that the state court's decision  
15          to deny relief was "was not clearly contrary to nor an unreasonable application of federal  
16          law." Doc. 14 at 8-11. The Court agrees with this conclusion. Similarly, Petitioner's  
17          added detail with regard to his claim that the trial court had not established its jurisdiction  
18          is unavailing because, as stated in the R&R, the Court of Appeals found that Petitioner  
19          had conceded he was incorrect with regard to whether the named commissioners had  
20          correct documentation on file to exercise jurisdiction, and that court's findings of fact –  
21          unless shown to be incorrect by clear and convincing evidence – are binding on this  
22          Court. *Id.* at 9, 12. Judge Aspey has already addressed all of the remaining issues raised  
23          in the petition. Merely reasserting the grounds of the petition as an objection provides  
24          this Court with no guidance as to what portions of the R&R Petitioner considers to be  
25          incorrect.

26          The Court will deem Petitioner's mere recitation of his earlier arguments  
27          ineffective. This ruling comports with the clear language of Rule 72(b) that a district  
28          judge "shall make a de novo determination . . . of any portion of the magistrate judge's

1 disposition to which *specific written objection* has been made[.]” Fed.R.Civ.P. 72(b)(2)  
2 (emphasis added); *see Sullivan v. Schriro*, No. CV-04-1517, 2006 WL 1516005 (D. Ariz.  
3 May 30, 2006). The Court is relieved of any obligation to review a general objection to  
4 the R&R. *See Thomas v. Arn*, 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)  
5 (stating that no review at all is required for “any issue that is not the subject of an  
6 objection.”); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (same).

7 **IT IS ORDERED:**

- 8       1. Petitioner’s motion for reconsideration is **granted**.  
9       2. Magistrate Judge Mark E. Aspey’s R&R (Doc. 14) is **accepted**.  
10      3. Petitioner’s petition for writ of habeas corpus (Doc. 1) is **denied**.  
11      4. The Clerk of Court is directed to **terminate** this action.

12 Dated this 7th day of February, 2012.

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David G. Campbell  
United States District Judge